On principle, the doctrine of the Kansas case that a judgment against a party described as trustee binds him in his representative capacity only, involves the inconsistency that while both his individual and his representative rights are held by him as one person, in order to enforce those rights he must become two persons. The doctrine is objectionable, moreover, on grounds of convenience, since it introduces new difficulties into the already complicated doctrine of *res judicata*, and tends to unsettle other departments of the law of trusts.

DAMAGES IN TROVER FOR SEVERANCE FROM REALTY. — A recent Alabama decision raises the unsettled question as to the measure of damages in trover for the conversion of coal severed from the realty by an innocent trespasser. *Ivy Coal & Coke Co.* v. *Alabama Coal & Coke Co.*, 33 So. Rep. 547. The case holds that the plaintiff may recover as damages the value of the coal immediately after severance. This rule was originally enunciated in England in *Martin* v. *Porter*, 5 M. & W. 351. A later decision, however, held that if the wrongdoer acted in good faith, the plaintiff might recover only the value of the coal in place. *Wood* v. *Morewood*, 3 Q. B. 440 n. This represents the existing rule in England. *Livingstone* v. *Rawyards Coal Co.*, 5 App. Cas. 25. The decisions in the United States, while they follow the English rule as to the measure of damages for a wilful taking, are in conflict as to an innocent taking. *Forsyth* v. *Wells*, 41 Pa. St. 291; *McLean County Coal Co.* v. *Lennon*, 91 Ill. 561. The same question has arisen with regard to trees and has resulted in the same difference of opinion. *Ayres* v. *Hubbard*, 71 Mich. 594; *White* v. *Yawkey*, 108 Ala. 270.

It is well recognized that the basic principle underlying the theory of damages in the common law is compensation for loss suffered. Any departure from that principle should have a clearly defined reason to support it. *Allison* v. *Chandler*, 11 Mich. 542. It is true that the general rule of damages in trover is the value of the chattel at the time of conversion. See SEDG. DAM. 8th ed. § 493. It would seem, however, that this general rule has its foundation in the fact that in the large majority of cases it will approximately determine the actual loss suffered. Accordingly, in a number of instances where the rule would not fulfil that purpose, a different measure of damages has been applied. Thus where a party wrongfully attached another's property, and subsequently attached it rightfully, it was held that the damages in an action of trover would be reduced in so far as the chattel had been applied under the second attachment in satisfaction of the plaintiff's debt. *Curtis* v. *Ward*, 20 Conn. 204. Similarly, it is well settled that where property is converted and subsequently returned and accepted by the owner, the damages will be reduced to the actual loss suffered. *Greenfield Bank* v. *Leavitt*, 34 Mass. 1.

The argument of the principal case is that when the coal is separated it is the plaintiff's chattel, and consequently, applying the general rule, it follows that for depriving him of that chattel, the damages must be the value of the coal immediately after severance. But since the damages recovered included the value of the labor expended by the defendant in mining the coal, they were obviously more than the actual loss suffered. On the principle of the cases cited above, therefore, there would seem to be a sufficient reason for departing from the general rule. The fact that in those cases

the circumstance which caused the reduction in damages occurred after the conversion does not seem material. *Waters* v. *Stevenson*, 13 Nev. 157. They go rather on the ground that the general rule of damage would give the plaintiff more than compensation. For these reasons a result different from that reached in the principal case would seem to be preferable both in point of justice and as a matter of theory.

On principle the same result should be reached in case the taking were wilful, but the courts would ordinarily give the value at the time of conversion as a punishment to the wrongdoer.

IMPLIED WARRANTY AGAINST LATENT DEFECTS. — It is frequently stated that a vendor impliedly warrants the merchantability of goods sold to a purchaser who has no opportunity to examine them. It is doubtful, however, whether this warranty extends to defects not discoverable by examination. A recent English case, decided under the Sale of Goods Act, suggests the question how far the law will imply a warranty against such latent defects. The plaintiff was poisoned by some beer which he bought from the defendant, a retail seller. The presence of the poison which the beer contained could have been detected only by a skilful chemical test. Yet it was held that there was an implied warranty by the defendant that the beer was fit to drink. *Holt* v. *Wrenn*, 19 T. L. R. 292 (Eng., C. A.).

There is an apparent conflict on the subject of warranties against latent defects, owing to a failure to distinguish between warranties implied in law and warranties implied from the description of the goods sold. Where, for instance, grain is sold as "No. 2 White Wheat," there is a warranty that the grain sold agrees with the description. *Whitaker* v. *McCormick*, 6 Mo. App. 114. This is often called an implied warranty, but, since it arises only from the words used by the parties, it is in its nature rather express than implied. For that reason it is rightly held to cover latent defects. *Wolcott* v. *Mount*, 38 N. J. Law 496. But with regard to a warranty of merchantability, which is a true implied warranty, American courts have drawn a sharp distinction between sales by a dealer and sales by a manufacturer. The manufacturer is held to warrant against all defects, whether they are discoverable by examination or not. *Rodgers* v. *Stiles*, 11 Oh. St. 48. The dealer is held to warrant only against discoverable defects. *White* v. *Oakes*, 88 Me. 367.

Whether there is sufficient difference between the two to justify the distinction may well be doubted. The situation of the dealer differs from that of the manufacturer, if at all, only in that the former has not so great an opportunity to obviate or detect the defect. But, while this difference might have its bearing on the dealer's tort-liability for negligence, it does not necessarily mean that he has impliedly promised less. An implied warranty is arrived at by reading into the contract a stipulation which it does not contain, but which the parties would have inserted, had their attention been directed to the possibility of a defect. In determining what this stipulation must be, the true test is what the generality of mankind would regard as fair under the circumstances. The ordinary purchaser would certainly expect to get as good an article from the dealer as from the manufacturer for the full price he has paid. And on the other hand it is no hardship on the dealer to make good the deficiency in an article for which he has received full value. True, if a warranty be implied the dealer might be liable for large collateral